MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY RESPONSIVENESS SUMMARY TO PUBLIC COMMENTS RECEIVED ON THE EXXON MOBIL CORPORATION PARTIAL CONSENT DECREE

June 20, 2007

In 2004, the Montana Department of Environmental Quality (DEQ) filed a lawsuit against a number of defendants to require the environmental cleanup of three neighboring and interrelated state superfund facilities, the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil Corporation Facilities. DEQ has previously entered into Partial Consent Decrees (CDs) with two of the defendants, the Montana Department of Natural Resources and Conservation (DNRC) and Swank Enterprises (Swank), both of which have been approved by the Court.

On March 14, 2007, DEQ entered into a CD with Exxon Mobil Corporation (Exxon) that was lodged with the Court on March 16, 2007. DEQ solicited public comment on the document and the public comment period on this CD ran from March 17, 2007 to April 15, 2007 at midnight. DEQ published notice of the comment period in the Daily Interlake and the Independent Record, posted the document on its website, and provided specific notice to the Flathead County Commissioners, the Kalispell Mayor, and the Kalispell City Council.

DEQ has carefully considered all comments received. No changes were necessary to the CD as a result of public comment. In this document, DEQ describes the basis for the CD, responds to the comments received and indicates its intention to submit the CD to the Court for approval. Attached to this document is a list of the records in the administrative record upon which DEQ based its decision. These documents are being lodged with the Court for its review and a set of these documents is also available at DEQ's offices located at 1100 North Last Chance Gulch, Helena, Montana.[1]

I. Introduction to Superfund Law

DEQ is the agency charged with administration and enforcement of Montana's state superfund law, the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), §§ 75-10-701 et. seq., MCA. CECRA is based on the federal superfund law known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC 9601 et seq.

CECRA imposes strict, joint and several liability for remediation of a CECRA facility on certain persons, including:

[1] DEQ previously submitted three volumes of administrative records to the Court. This responsiveness summary uses some of those same documents; for those documents used in the prior record but not referenced herein, DEQ has deleted the Exhibit name from the Exxon administrative record list in order to avoid confusion. Administrative record documents used solely in the Exxon responsiveness summary have been assigned a new Exhibit number to avoid confusion.

a. A person who owns or operates a facility where a hazardous or deleterious substance was disposed of (i.e., a current owner or operator);
b. A person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of (i.e., a past owner or operator);
c. A person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and arranged for disposal or treatment of the substance or arranged for transport for disposal or treatment (i.e., a generator); and
d. A person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility (i.e., a transporter).

Section 75-10-715, MCA. CECRA also provides for defenses to and exclusions from liability. In addition, CECRA does not define a "facility" solely with respect to property ownership or boundaries but includes within the definition of "facility" "any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located." Section 75-10-701(4)(a)(ii), MCA.

One of the purposes of CECRA is to "encourage private parties to clean up sites." Section 75-10-706(1)(b), MCA. To that end, DEQ is encouraged to "expedite effective remedial actions and minimize litigation" by entering into settlement agreements with liable persons. Section 75-10-723, MCA. DEQ is given broad discretion to enter into settlement, guided by the principles that any settlement be "practicable and in the public interest." *Id*. Such settlement may contain whatever terms and conditions DEQ, "in its discretion determines to be appropriate." *Id*.

II. Background on Facilities and Liable Persons

There are three facilities that are the subject of the current litigation. These facilities are very complex due to the nature of the contamination, site geology and conditions, and the fact that plumes of contamination have commingled together. (Exhibit A, Page 35; Exhibit ZZ, Page ES-1)

Kalispell Pole and Timber (KPT)

The KPT Facility is upgradient with respect to groundwater flow of the other two facilities. (Exhibit L, Figure 1-2) DEQ believes it is contributing the most environmentally damaging contamination of the three facilities. The Kalispell Pole and Timber Company (KPT Company) operated a wood-treating operation from approximately 1944 to 1990 on property KPT Company owned as well as property it leased from the BNSF Railway Company (BNSF)[2]. (Exhibit C, Pages 3 and 5, Exhibit D, Pages 5 and 15) Beginning in 1971, the KPT Company also leased property from DNRC for the purpose of pole storage. (Exhibit C, Page 4) The KPT Company used pentachlorophenol (PCP) mixed in a petroleum-based carrier solution to treat the wood (Exhibit D, Page 16), which resulted in contamination of soils and groundwater with PCP, petroleum, dioxins/furans, and other hazardous substances. (Exhibit D, Page 21, Exhibit E, Page

[2] When referring to BNSF, it includes the predecessor companies of BNSF. When referring to DNRC, it includes the predecessor agency of DNRC, the Montana Department of State Lands. When referring to DEQ, it includes the predecessor agency of DEQ, the Montana Department of Health and Environmental Sciences. When referring to Exxon Mobil, it includes the predecessor companies of Exxon.

11) When the KPT Company dissolved in 1990, it sold its real property to Montana Mokko and Swank. (Exhibits F and G) BNSF continued to lease its real property to Klingler Lumber Company (Exhibit H, Pages 3-4) and Montana Mokko continued to use the property, constructing a finger-joining facility and sawmill on BNSF property. (Exhibit SS) In 1992, Klingler Lumber Company purchased some property at the facility from Swank. (Exhibit H, Attached Deed from Swank to Klingler)

The liable persons at this facility named in the litigation include: the KPT Company, BNSF, DNRC, Klingler Lumber Company, Montana Mokko, and Swank.

Reliance Refinery Company

The Reliance Refinery Facility is located immediately east of the KPT Facility. (Exhibit L, Figure 1-2) The property was used as a petroleum refinery and cracking plant from the 1920s through about 1958. (Exhibit A, Page 2) DNRC took title to the property on December 26, 1933 through a Sheriff's Deed Under Foreclosure after the Reliance Refining Company that owned the property quit paying its taxes. (Exhibit J) DNRC then leased the property to Boris Aronow dba the Unity Petroleum Company until 1969. (Exhibit A, Page 2) Refinery operations resulted in contamination of soils and groundwater with petroleum and lead contamination has also been found in soils. (Exhibit A, Pages ES-2 and ES-3) The DNRC property was leased to the KPT Company from 1969 to 1990 (when the KPT Company dissolved), during which time it was used for storage of poles. (Exhibit C, Page 4) BNSF owns a spur line that runs through the facility. (Exhibit T)

The liable persons at this facility named in the litigation include: BNSF, DNRC, and Swank.

Yale Oil Corporation Facility

The Yale Facility is located south/southeast of the Reliance Refinery Facility. (Exhibit L, Figure 1-2) The property was used by Exxon as a refinery beginning in the 1930s and then beginning in the 1940s, it was used by T.J. Landry Oil Company, Inc. as a bulk fuel storage facility until about 1978. (Exhibit K, Page 4) The operations resulted in contamination of soils and groundwater with petroleum. (Exhibit K, Pages 11-34) More details on this facility are included below.

The liable person at this facility named in the litigation includes Exxon. In addition, the defendants named at the other two upgradient facilities are liable for the Yale Facility to the extent that contamination from the upgradient facilities has commingled with any contamination from the Yale Facility.

Relationship of Three Facilities

As described above, each person is subject to strict, joint and several liability for a facility which includes any area where contamination from that facility has come to be located. For example, even though BNSF never owned or operated the Yale Facility, CECRA holds BNSF responsible for cleaning up the groundwater at Yale since contamination in that groundwater came, in whole or in part, from BNSF upgradient facilities for which BNSF is a liable person. (See Exhibit B, Page 6, which explains that businesses located on the Reliance and Yale Facilities did not use

PCP in their operations and Exhibit L, Page 6-1, which states that the PCP plume extends to GWY-14, a monitoring well on the Yale Facility; see also Exhibit ZZ.)

III. The Consent Decree Process

A Consent Decree provides a mechanism for DEQ to settle with a liable person and provide contribution protection from other liable parties to that person. Section 75-10-719, MCA, provides that a person who has resolved his liability under CECRA is not liable for claims of contribution regarding matters addressed in the settlement.

The process for reaching agreement under a Consent Decree requires that DEQ gather information and conduct fact finding to assist it in determining reasonable terms of settlement. DEQ enters into negotiations with a liable person to attempt to reach settlement. If the terms of a Consent Decree are reached and the document is executed between the parties, DEQ then lodges it with the Court and requests public comment on the document. Public comment is an important part of the process and is required under § 75-10-713(1)(a), MCA. In fact, DEQ may modify or withdraw its consent to the Consent Decree if comments received disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper or inadequate. See Section XX of the Exxon CD. If DEQ believes the settlement is consistent with CECRA's goals and is reasonable and fair, DEQ then asks the Court to approve it.

A. Consistency with CECRA's goals

As discussed, a Consent Decree must further certain legislative goals as set forth in CECRA. The primary goal of CECRA is to ensure protection of public health, safety, welfare and the environment. Section 75-10-706, MCA. The two major policies underlying superfund laws in general and CECRA in particular are prompt and effective cleanup and holding persons designated as liable persons under § 75-10-715, MCA, responsible for their approximate share of the hazard and consequent cleanup costs. See U.S. v. Charter Intl. Oil Co., 83 F.3d 510, 522 (1st Cir. 1996) (citing Cannons Engr., 899 F.2d at 89-91; U.S. v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D.N.J. 1989)). Legislative intent underlying superfund liability was to expedite an effective response while minimizing litigation. U.S. v. Atlas Minerals & Chems., Inc., 851 F. Supp. 639, 655 (E.D. Penn. 1994) (citing Cannons Engr., 899 F.2d at 90-91). The primary goal of CERCLA and other superfund laws is to encourage early settlement. U.S. v. Montrose Chem. Corp. of Cal., 793 F. Supp. 237, 240 (C.D. Cal. 1992). Consent decrees are the tool through which such early settlement is achieved.

Superfund law was designed to encourage settlement and provide liable persons a measure of finality in return for their willingness to settle. Defendants in Superfund cases generally settle for substantially less--indeed, often for far less given the inherent problems of proof in these cases--than the asserted damages. This may lead non-settling parties to bear a share of the liability disproportionate to their comparative fault. However, this disproportionate liability is a recognized technique that not only promotes early settlements and deters litigation for litigation's sake, but also is an integral part of the statutory plan of superfund law. In this case, settlement with Exxon furthers CECRA's goals and may encourage other defendants to consider early settlement.

B. Reasonableness

Based on Cannons, DEQ looks to three factors to determine if a Consent Decree is reasonable. The first factor that is considered is the decree's likely effectiveness for ensuring protection of human health and the environment. This is of cardinal importance. Except in cases which involve only recoupment of cleanup costs already spent or a settlement based on a percentage of future remediation and not a sum certain, the reasonableness of the consent decree, for this purpose, will typically be a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses.

A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of settlement can be enormously complex. The actual cost of remedial measures is frequently uncertain at the time a consent decree is proposed. In cases where a settlement is based on a certain percentage of future costs, this uncertainty is not important as the settling party has assumed the risk of an overly expensive remediation. Where the settlement's bottom line is made definite by a sum certain to be paid by the settling party, the proportion of settlement dollars to total needed dollars is often difficult or impossible to determine with mathematical precision. In such instances DEQ will use its expertise and best efforts together with the available information to estimate the likely remediation and its costs. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. DEQ has prepared a Final Draft Remedial Investigation (RI) and determined the nature and extent of contamination at the facilities. Based on the data generated during this investigation, DEQ has determined it can settle with Exxon for a sum certain.

The third reasonableness factor relates to the relative strength of the DEQ's case against the settling party. Where DEQ's case is strong and solid, it will require more in settlement. Conversely, where DEQ's case is weaker or the settling party has a strong defense to liability, or the outcome is problematic (it may take time and money to collect damages or to implement private remedial measures through litigation success), a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss. As discussed below, DEQ considered Exxon's defenses when evaluating the reasonableness of settlement.

C. Fairness

Fairness of Consent Decrees includes concepts of both procedural fairness and substantive fairness. Procedural fairness speaks to the negotiation process that leads to the Consent Decree and to the parties' candor, openness, and bargaining balance. DEQ will ensure procedural fairness by conducting its negotiations forthrightly and in good faith. Substantive fairness requires that a settling party roughly bear the cost of the harm for which it is legally responsible. To ensure substantive fairness, settlement terms should be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each liable

person has done. DEQ will generally rely upon the application of liability factors provided under §75-10-750, MCA, to the settling party and the known facts at the time of settlement to ensure substantive fairness of any Consent Decree. Individual site or party specific facts and the need to be faithful to the goals of CECRA will also be considered by DEQ to ensure substantive fairness. DEQ's evaluation of the CECRA factors is described below.

IV. Adoption of the Subject Consent Decree

Consideration of Allocation Factors

Section 75-10-750, MCA, lists the factors that DEQ considers in determining a fair and reasonable allocation of liability at a CECRA facility. They include:

1. the extent to which the person caused the release of the hazardous or deleterious substance;
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished;
3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person;
4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity;
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act];
6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices;
7. the circumstances of the property acquisition, including the documented price paid and discounts granted;
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal;
9. the length of time of ownership, operation, generation, or transportation;
10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification;
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services;
12. the person's financial or economic benefit from (a) ownership or operation of the facility; (b) the generation, transportation, or disposal of the hazardous or deleterious substance; and (c) cleanup of the facility;
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substances and the person's control over those activities; and
14. other equitable factors that are appropriate.

DEQ focuses on evaluating these factors and conducts a comparative fault analysis to determine a reasonable range of liability for the settling defendant. As explained above, the parties then negotiate not only the liability assessment but also the other terms of the Consent Decree.

Because a final remedy has not yet been selected at the facilities, DEQ cannot say how much the final cleanup costs will be. However, DEQ has a significant amount of information regarding the operational history of each facility and the basis for each defendant's liability. In addition, DEQ has prepared a Final Draft RI and determined that settlement with Exxon for a sum certain is fair and reasonable.

Details on the Yale Oil Corporation Facility

The Yale Facility is a former petroleum bulk plant and product refinery that operated from 1938 to 1978. The facility encompasses approximately 2.3 acres. Leaks and possible spills from aboveground storage tanks contaminated on-site soils. Yale Oil Corporation developed the property for use as a refinery and bulk plant in the 1930s. The facility refined crude oil from the Kevin-Sunburst oil fields in north-central Montana, which were developed in 1923. Crude oil was delivered to the facility by truck and rail. The refinery has been described as a small operation with a daily capacity of 500 barrels. Tractor fuel (similar to diesel) and fuel oil were the primary products of the refinery. Crude oil and petroleum products were stored in aboveground storage tanks. Yale Oil Corporation owned and operated the facility until 1944, when the property was sold to Carter Oil Company. Refining operations at the facility ceased shortly after. Facility features present on the 1927 Sanborn map are labeled as "not used" on the 1950 Sanborn Map. As early as 1945, Carter Oil leased the property to the T.J. Landry Oil Company, Inc., a petroleum products distributorship. Mr. Landry ran the distributorship until he turned over management of the operation to his son-in-law, Bill Roberts. Mr. Roberts managed the distributorship until 1978. (Exhibit VV, Page 10).

On December 15, 1959, Carter Oil, along with Esso Standard Oil, merged with Humble Oil and Refining Company. Humble Oil merged with Exxon Corporation on December 26, 1972 (Exhibit ZZ, Page 1-12). In February 1978, the bulk plant operations at the facility were closed. The product inventory and all storage tanks, except the No. 5 fuel oil tank, were purchased by City Service Center and then moved to its property south of Kalispell. In February 1980, Exxon Corporation granted the property to the Exxon Education Foundation. The property was sold to the National Development Corporation (NDC) in December 1981. In 1982, the Pacific Iron and Steel Division of Pacific Hide and Fur dismantled the No. 5 fuel oil tank. The No. 5 fuel oil tank was cut off near ground level, leaving the tank bottom and lower sidewalls in place. Any product, sludge, or tank bottom that remained in the tank was left in place (Exhibit ZZ, Page 1-13). In October 1983, property ownership reverted to the Exxon Education Foundation and subsequently to Exxon Corporation in November 1988.

Exxon conducted a voluntary cleanup action in 1993. Thermal desorption, using a permitted unit, was conducted on the soils to remove petroleum hydrocarbon contamination. However, groundwater beneath the facility remains contaminated with PCP and dioxins/furans.

The current property owner is Kalispell Partners LLC, and a commercial business currently exists on the facility.

Exxon Consent Decree

After DEQ filed the subject lawsuit, it held meetings with every defendant, including Exxon, to discuss settlement options. DEQ began serious discussions with Exxon around July 2006. As part of its evaluation of Exxon's liability, DEQ considered all the factors contained in § 75-10-750, MCA, and conducted a comparative fault analysis. DEQ relied on its engineers and scientists to assess the technical information and relied on its attorneys to assess strengths and weaknesses of its litigation position and conducted arms-length negotiations with Exxon. The following is a brief summary of how DEQ considered the Section 75-10-750, MCA factors in applying them to Exxon:

1. the extent to which the person caused the release of the hazardous or deleterious substance: Yale Oil Corporation developed the property for use as a refinery and bulk plant in the 1930s. Yale Oil Corporation owned and operated the facility until 1944, when the property was sold to Carter Oil Company. On December 15, 1959, Carter Oil, along with Esso Standard Oil, merged with Humble Oil and Refining Company. Humble Oil merged with Exxon Corporation on December 26, 1972. (Exhibit ZZ, Page 1-12) In December 1981, Exxon Corporation sold the property to NDC; Exxon reacquired the property in 1983 and then sold it again in 1996. The primary documented release occurred during NDC's ownership, although a 1985 Report indicates that product seepage occurred from 1945 to 1978. (Exhibit VV, Page 10) In addition, in a recent Montana Supreme Court case, the court implied that judicial notice may be appropriate when addressing a situation such as this. See Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indem. Co., 2006 MT 133 (2006) ("The exact cause of the contamination has not been determined. It was most likely the result of several independent factors, including the underground storage tank leak…In addition, the gas station had been in operation since 1931, therefore it is inevitable that small amounts of gasoline were spilt on the ground over the years.") Therefore, it is reasonable to allocate liability to Exxon for the petroleum contamination that likely occurred over many years at the Yale Facility during Exxon's ownership and operation.
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished: Exxon's property had confirmed petroleum contamination. (Exhibit A, Page 26) There is no known source of PCP or dioxins/furans on the Yale Facility and, based on DEQ's experience, the PCP and dioxins/furans contamination will drive the cost of cleanup.
3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person: the extent of historical contamination, prior to 1983, is unknown. What is known is that in 1981, during NDC's ownership of the Yale facility, NDC hired a contractor to dismantle and remove a tank on the property that had been used to store No. 5 fuel oil. This action left the tank bottom and six to 12 inches of the tank wall in place - including remnants of the petroleum product stored in the tank. Because the tank bottom and walls were left open to the environment, precipitation caused the tank remnants to overflow, releasing petroleum products onto

the soil. In addition, as stated above, DEQ believes ongoing contamination of the property likely occurred from at least 1945 to 1978. (Exhibit VV, Page 10) The precise amounts or volumes are unknown.

4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity: Exxon's former property was a source of petroleum contamination. However, Exxon conducted a cleanup of the soils at the facility in 1993 and the RI, completed by DEQ in summer 2006, indicates that, based on draft site-specific cleanup numbers, no petroleum contamination requiring cleanup exists in the soils. (Exhibit ZZ) PCP and dioxins/furans contamination in the groundwater which may require cleanup is due to upgradient contamination from the KPT Facility. In addition, the more hazardous and expensive contaminants to cleanup at these facilities are PCP and dioxins/furans. The Yale Facility is not a source of these contaminants. The most heavily contaminated PCP source area is on BNSF property. (Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; see also Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.")
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act]: DEQ generally views Exxon as a cooperative party. Exxon conducted an extensive voluntary cleanup of the Yale Facility in 1993 and remediated the vast majority of contaminated soils. In fact, when DEQ filed the subject litigation, Exxon was the only defendant against whom penalties were not sought. (Exhibit WW, Page 8, Fifth Claim for Relief) Exxon excavated approximately 10,465 tons of soil and processed it through a thermal desorption unit, which was a relatively new and innovative technology at that time. (Exhibit EE) There was considerable effort and money involved in the excavation and cleanup of the soil at the Yale Facility. Additionally, the source area at the Yale Facility was removed, resulting in concentrations of many fractions of petroleum constituents in groundwater steadily decreasing to nearly non-detect over the years. (Exhibit FF) Two notable issues on which DEQ considered Exxon to be non-cooperative was that Exxon did not provide a completion report on its remedial work which would have allowed DEQ to verify its effectiveness. This required DEQ to spend money investigating the Yale Facility during the RI. In addition, Exxon quit paying DEQ's oversight costs in late 2004.
6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices: Because Exxon and its predecessors are companies with experience in dealing with petroleum products, DEQ believes it is reasonable to assume Exxon had, or should have had, at least a requisite knowledge of the hazardous substances on the property. DEQ also believes Exxon was careless in leaving the fuel oil tank containing petroleum on the property when transferring it to NDC.

7. the circumstances of the property acquisition, including the documented price paid and discounts granted: DEQ does not have any current information regarding the circumstances of property acquisition. Exxon acquired the property through a series of mergers dating back many years ago. (Exhibit ZZ, Page 1-12)
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal: Given Exxon's history as a petroleum company, actual or constructive knowledge of waste disposal may be imputed to Exxon.
9. the length of time of ownership, operation, generation, or transportation: Exxon disputes that it owned the property prior to 1944. However, there is no dispute that Exxon owned and/or operated the property from 1944 until 1981, then again from 1983 until 1996. (Exhibit XX, Page 12, footnote 3)
10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification: DEQ is unaware of any violations by Exxon at the Yale Facility.
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services: This factor does not apply to Exxon.
12. the person's financial or economic benefit from (i) ownership or operation of the facility; (ii) the generation, transportation, or disposal of the hazardous or deleterious substance; and (iii) cleanup of the facility: Exxon received financial and economic benefit from ownership and operation of the facility as the property provided a location to support Exxon's operations.
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substance and the person's control over those activities: But for Exxon's failure to address tanks prior to its transfer of the property to NDC, the fuel oil tank release could not have occurred. This shows a lack of due diligence on Exxon's part. DEQ has no information regarding Exxon's due diligence in operating the facility prior to 1981 but believes it is inevitable that spills occurred during the time the property was used as a refinery, bulk storage plant, and gas station.
14. other equitable factors that are appropriate. Exxon raised a number of defenses to liability, including that it did not cause or contribute to the release, and thus had a defense under CECRA. DEQ put considerable weight on the fact that Exxon voluntarily conducted a cleanup of the Yale Facility in 1993 and that RI data generated in the fall of 2006 indicates little if any remaining contamination in the soils at the facility.

Before the RI was conducted and during the time DEQ was analyzing comparative fault amongst the defendants in order to discuss settlement with DNRC and Swank, DEQ applied these factors to the facilities and Exxon's situation and determined an initial target allocation for Exxon's liability for all facilities to be 5%. For this initial assessment of Exxon's target liability, DEQ examined the number of liable person categories (owner, operator, arranger, or generator) and the number of facilities under which Exxon was liable under CECRA and compared this to the same analysis for the other defendants. Because of the 1993 cleanup conducted by Exxon, and the fact that Exxon does not have independent liability for the KPT or Reliance Facilities, DEQ has never viewed Exxon as having a large share of liability. DEQ's concern was that Exxon did

not provide confirmation sampling or a closure report after the 1993 cleanup to demonstrate the success of the project. (Exhibit YY, Page 8) As DEQ stated in that Exhibit, had Exxon confirmed the effectiveness of its remedial efforts, "it would not be a defendant in this suit." (Exhibit YY, Page 17)

When DEQ conducted the RI in the summer of 2006 and analyzed the data, it became apparent that there was little, if any, remaining petroleum contamination in soils at the Yale Facility. This indicates to DEQ that Exxon's 1993 cleanup was largely successful and no further source control is needed at that facility. In fact, had Exxon "closed the loop" by completing adequate confirmation sampling, Exxon would never have been a defendant in the litigation. This lead DEQ to reassess its initial allocation of Exxon's liability for all facilities downward from its original target of 5%.

Upon completion of the RI, DEQ developed site-specific cleanup numbers and has compared all of the soil samples collected from the Yale Facility to these cleanup numbers. There is a small area at the Yale Facility that may require cleanup; it would address surface soils in a limited area along the roads for dioxins/furans.[3] No other exceedances of site-specific cleanup numbers exist in surface or subsurface soil. (Exhibit ZZ) The remaining groundwater contamination is attributable to the upgradient facilities. Given the fact that the only contamination remaining at the Yale Facility is found in the groundwater and is attributable to the KPT and Reliance Facilities, it is appropriate to allow Exxon to settle its liability for a sum certain.

As stated above, DEQ began serious settlement discussions around July 2006. DEQ began negotiating with Exxon in earnest in the fall of 2006 after DEQ's review of the RI data. At that time, DEQ estimated its outstanding costs at the Yale Facility to be around $200,000 and that is the number that was used for past cost discussions. Because DEQ's RI work established the effectiveness of Exxon's prior cleanup, DEQ believes it appropriate for Exxon to reimburse a portion of the cost of that work. In addition, DEQ required a settlement premium of Exxon in consideration of Exxon's receipt of contribution protection. The parties also took into consideration the costs of continued litigation and the relative strengths and weaknesses of their respective outstanding summary judgment motions. DEQ and Exxon resolved the dollar amount of settlement in October 2006. DEQ used the Court-approved format of the DNRC and Swank CDs as the basis for the Exxon CD. However, specific terms still had to be negotiated and this work continued until the end of January 2007.

DEQ did not believe Exxon's defenses to liability would ultimately be successful, but they would require DEQ to incur substantial resources to disprove them. These resources are better put to remediation of the facility particularly where, as in this case, the defendant is not likely to be found responsible for a large portion of the liability. In that light, DEQ reduced its target allocation for Exxon and determined that sum certain payment was appropriate.

[3] This limited area of dioxins/furans contamination in surface soil along the road may not require cleanup. DEQ may calculate an exposure point concentration to make the final determination.

V. Responses to Public Comment

Only BNSF submitted public comments on the Exxon CD to DEQ. These comments are attached as Exhibit AAA. No other public comments were received by DEQ. Those comments (paraphrased where appropriate) and DEQ's responses are below.

Comment 1: The Exxon CD is premature as DEQ is still in the process of selecting the remedy for the facilities. Until a remedy is selected, DEQ is unable to determine the extent of future costs. If DEQ believes that prior remediation efforts and natural attenuation have addressed contamination at Yale, DEQ should postpone entering the CD until the release of the Record of Decision.

Response: DEQ carefully analyzed the factors found in § 75-10-750, MCA, as described above and applied a comparative fault analysis. After considering all information and balancing all the factors, DEQ believes that this settlement is consistent with CECRA's goals. DEQ conducted its negotiations with Exxon and believes that Exxon is bearing the cost of the harm for which it is responsible. DEQ carefully weighted the strengths and weaknesses of its case against Exxon, including the fact that there were outstanding motions for summary judgment. DEQ particularly focused on the RI data for the Yale Facility that indicated that Exxon's 1993 cleanup was apparently successful. Finally, settlement with Exxon is consistent with CECRA's goals of encouraging settlement and providing Exxon a measure of finality in exchange for a premium on its probable liability and its willingness to settle. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. DEQ used its expertise and best efforts together with the available information to determine a fair and reasonable settlement with Exxon and is entitled to deference in its determinations. As Judge Sherlock pointed out in his March 14, 2006 Memorandum and Order which approved the DNRC and Swank CDs, DEQ is "not required to show precise knowledge as to the source or cause of contamination or the total amount it will cost to complete cleanup" before settling with a liable party. (Exhibit BBB, page 7)

Comment 2: If DEQ deems the Yale Facility remediation complete, BNSF anticipates that DEQ will no longer incur oversight costs associated with Yale and that DEQ will not shift its cost to the KPT or Reliance Facilities.

Response: DEQ does not anticipate incurring significant future oversight costs with respect to the Yale Facility, except as it relates to contaminated groundwater. That contaminated groundwater is attributable to the KPT Facility and, to a lesser extent, the Reliance Facility. Therefore, it is appropriate to divide DEQ's oversight costs evenly between the KPT and Reliance Facilities. Given that BNSF is liable for remediation of both these facilities as well as the contaminated groundwater at Yale, DEQ's billing procedures will not affect BNSF.

Comment 3: DEQ's costs as of December 2006 are $288,088.95. As BNSF has not received DEQ's invoices for costs incurred in 2007, it appears that the Exxon settlement will not cover the outstanding balance for oversight costs at Yale. If DEQ has not concluded that no further action of any kind is required at Yale, then it is premature to enter into the CD.

Response: DEQ began negotiating with Exxon in earnest in the fall of 2006 after DEQ's review of the RI data. At that time, DEQ estimated its outstanding costs at the Yale Facility to be around $200,000 and that is the number that was used for past cost discussions. Because DEQ's RI work established the effectiveness of Exxon's prior cleanup, DEQ believes it appropriate for Exxon to reimburse a portion of the cost of that work. In addition, DEQ required a settlement premium of Exxon in consideration of Exxon's receipt of contribution protection. DEQ and Exxon resolved the dollar amount of settlement in October 2006. The other defendants are jointly and severally liable for the groundwater contamination at the Yale Facility and, to the extent there is an oversight balance, the other defendants are responsible for those oversight costs.

Comment 4: It is unclear how the Yale CD will work in light of the DNRC and Swank CDs. The Exxon CD does not indicate that any cleanup activities were approved by DEQ. Will DNRC and Swank pay a percentage of costs at Yale under their respective CDs? Will any of the money from the Exxon CD go toward paying past or future costs incurred by BNSF, DEQ, or others at the KPT or Reliance Facilities?

Response: CECRA applies strict, joint and several liability to all parties, including BNSF. This liability may be reduced by the amount of settlement DEQ reaches with another party. See § 75-10-719(1), MCA. Therefore, settlement is in BNSF's interest because its liability will be reduced by $295,000 as a result of the Exxon settlement. BNSF is liable for the KPT and Reliance Facilities which include any place contamination from those facilities has come to be located. This includes the groundwater contamination at the Yale Facility. The settlement money from the Exxon CD will be applied to DEQ's outstanding costs at the Yale Facility. Thereafter, DNRC and Swank will pay a percentage of any future costs at Yale. Any shortfall must be paid by the other liable parties, including BNSF. Exxon is not receiving any monetary credit in the CD for the costs it incurred in remediating the Yale Facility. This is the same way DEQ addressed past costs incurred by DNRC and Swank in their CDs.

Comment 5: BNSF has incurred significant expenses in conducting remedial actions which have improved conditions at the Yale Facility. It is inappropriate to include a contribution protection clause in the Exxon CD when no court has determined appropriate allocation among all the defendants in the subject litigation. In addition, the Montana Supreme Court has indicated none of the CDs are binding until all claims have been fully resolved.

Response: The ability to offer contribution protection to a settling defendant is critical to DEQ's ability to settle Superfund cases. BNSF argued against contribution protection in the DNRC and Swank CDs and that argument was rejected by the District Court. (Exhibit BBB, Page 6). Unlike its case against DNRC and Swank, BNSF did not file a third party claim against Exxon so it is unclear why BNSF would object to the contribution protection. The purpose of settlement is to provide finality to a party in exchange for that party accepting a fair and reasonable share of liability that promotes CECRA's purpose and the public's interest – by ensuring protection of public health, safety and welfare and the environment. There is no question that the CD between Exxon and DEQ meets all the requirements necessary to be accepted by the Court. As to the terms of the Montana Supreme Court's Order (attached to Exhibit AAA), that document speaks for itself. The CDs DEQ enters with defendants are final when approved by the District Court,

subject only to the appeal rights of nonsettling parties. Nothing in that Order prohibits DEQ from settling with defendants in the subject litigation and BNSF can appeal those settlements "only once the District Court enters a final judgment adjudicating the rights and liabilities of all the parties."